

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 15, 2007 Session

**UPPER NORRIS CONSERVATION CLUB, INC. v. TOWN OF
CUMBERLAND GAP**

**Appeal from the Chancery Court for Claiborne County
No. 15238 Billy Joe White, Chancellor**

No. E2006-01963-COA-R3-CV - FILED MAY 31, 2007

Upper Norris Conservation Club, Inc. (“the Club”), a private club in Cumberland Gap, Tennessee (the “Town”), applied to the Town’s beer board for a permit to sell beer in its restaurant. The board denied the Club’s application on the ground that the Town’s beer ordinance limited the number of active beer permits to three and that no permits were then available. The Club appealed to the Chancery Court for Claiborne County, which, in a *de novo* hearing, ordered the issuance of the beer permit, finding that there was one beer permit available and that Cumberland Gap had shown no reason why the permit should not be issued to the Club. The Town appealed the Chancery Court’s order. After careful review, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Jon G. Roach, Knoxville, Tennessee, for the Appellant, Town of Cumberland Gap.

David H. Stanifer, Tazewell, Tennessee, for the Appellee, Upper Norris Conservation Club, Inc.

OPINION

I. Background

In January of 2006, the Club applied to the Town of Cumberland Gap for a permit to sell beer on its premises. On the same day, Sodexho Campus Services, doing business as University Inn, also applied for a beer permit. The Town’s beer ordinance provides that “[t]he total number of beer establishments allowed under this chapter shall not exceed three.” At the time of the applications, there were two permits outstanding. One permit had been issued to an active business, and the other

had been issued to a restaurant known as the Tea Room, and there was some question as to whether the Tea Room was still in business.

At the meeting of the Town's beer board in February of 2006, the board voted to grant Sodexho a beer permit and denied the Club's application, stating that the permit granted to Sodexho was the only permit then available. The Club appealed the board's decision to the Claiborne County Chancery Court. The Town alleged in its answer, and argued at trial, that the Club was not issued the permit because at the time it and Sodexho applied for permits, there was only one beer permit available and it was issued to Sodexho. At trial, the Town admitted that the Tea Room was closed, and the property on which it was located had been sold. The Town attempted to argue that an additional reason the Club was denied a permit was because it had previously received citations from the state Alcoholic Beverage Commission for, among other things, selling beer without a license.¹ The trial court excluded the Town's evidence of the Club's prior Alcoholic Beverage Commission citations because of their lack of relevancy and also because the Town did not plead or otherwise allege the citations as a basis for denying the permit in its answer; thus, the Club had no notice of the Town's intention to rely upon the citations. The trial court determined there was a beer permit available for issuance even after Sodexho was granted a permit, and that under the Town's beer ordinance, there was no legally sufficient reason why the Club should not be granted a permit.

II. Issues Presented

The Town appeals the trial court's judgment ordering it to issue the Club a beer permit. This requires us to consider the following issues:

1) Whether the evidence preponderates against the trial court's finding that there was a beer permit available for issuance to the Club.

2) Whether the trial court abused its discretion by disallowing the introduction of evidence regarding the Club's history of receiving citations from the Alcoholic Beverage Commission.

III. Standard of Review

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993). "Appeals to this Court in cases involving beer permits are accompanied by a presumption of the correctness of the action of the trial judge. Such action will

¹The number of prior citations is not entirely clear; it appears the Club had been cited by the Alcoholic Beverage Commission on either two or three prior occasions.

not be disturbed on appeal unless the evidence preponderates against it.” *Coffman v. Hammer*, 548 S.W.2d 310, 311 (Tenn. 1977).

IV. Analysis

A. Availability of Beer Permit

Our state legislature has vested incorporated municipalities with broad discretionary powers in the regulation and control of matters relating to beer sales within the city limits. *Neece v. City of Johnson City*, 767 S.W.2d 638, 639 (Tenn. 1989). As we have stated previously, “A city may prohibit the sale of beer altogether, or it may set a specific limit to the number of beer outlets.” *Dixon v. Lawrenceburg Beer Bd.*, No. 01A01-9809-CH-00484, 1999 WL 499731, at *2 (Tenn. Ct. App. M.S., July 16, 1999) (internal citations omitted). However, a municipality may not exercise its powers regarding regulation of beer sales in an arbitrary or discriminatory manner. *Id.* at *1. In keeping with that requirement, we have recognized that in order for a city to properly exercise this power, it must do so by validly enacted ordinance. *Harper Enterprises, LLC v. City of Bean Station*, No. E2002-01734-COA-R3-CV, 2002 WL 31895516, at *3 (Tenn. Ct. App. E.S., Dec. 30, 2002).

The Town’s beer ordinance sets forth the requirements that an applicant must meet to obtain a beer permit. It necessarily follows that the Town may not require more than its ordinance mandates. Accordingly, the language of the Town’s beer ordinance² is particularly pertinent, and it provides in relevant part as follows:

Permit required for engaging in beer business. It shall be unlawful for any person to sell, store for sale, distribute for sale, or manufacture beer without first making application to and obtaining a permit from the beer board. The application shall be made on such form as the board shall prescribe and/or furnish. Each applicant must be a person of good moral character and he must certify that he has read and is familiar with the provisions of this chapter.

Establishments from which beer may be sold. Beer may be sold at the following types of establishments:

* * *

(2) Establishments for consumption on the premises. A regularly opened restaurant which seats 150 or more...Under no circumstances are these establishments allowed to sell beer for consumption off the premises.

* * *

²The Town’s beer ordinance has subsequently been amended; the quoted provision contains the language of the ordinance in effect at the time of the applications and the beer board’s denial of the permit to the Club.

Distance from churches and schools. No establishment for the sale of beer shall be located within five hundred (500) feet of an established church or school...

Permits not transferable. No permit for the sale of beer issued by the beer board shall be transferable from one place to another or from one person to another.

(Numbering omitted). The Town did not allege that the applicant failed to make application on the Town's prescribed form; that the applicant was not "a person of good moral character"; that the applicant had not read or familiarized herself with the Town's beer sales laws; that the Club was not a regularly opened restaurant which seats 150 or more; or that the Club was in violation of the 500-foot distance requirement. Ms. Newmeier, who completed the permit application for the Club, testified without contradiction that she answered all of the questions on the application truthfully, and that no member of the Club had been indicted or convicted of an offense related to the sale of alcohol or beer since she had been operating the Club.

Therefore, it appears the Club met all of the requirements for the issuance of a beer permit, if one of the Town's three permits was available for issuance. The Town alleged in its answer to the petition that its reason for denying the permit to the Club was that "at the time of the application for a beer permit by the Club and Sodexho, there was one (1) unissued beer permit available to be issued...[o]nce the Beer Board issued a beer permit to Sodexho no beer permit was available to be issued since the Town has by ordinance limited the number of beer permits to three (3)." The trial court found to the contrary, holding as follows: "I think that at the time of this application that there were actually two permits available. The Tea Room was closed...that Tea Room will never operate again under the same management. I think everybody knew at that time that there were two, and there was never any intention under any circumstances to give the Upper Norris Conservation Club a beer permit." The evidence does not preponderate against these findings. As already noted, counsel for the Town admitted at the start of the hearing that the Tea Room had been sold. Because the Town's ordinance provides that a beer permit is nontransferable, the sale of the Tea Room resulted in a second beer permit being available for issuance. Therefore, even after Sodexho was issued a permit, there was still one permit available for the Club, if it met the ordinance requirements. Because the Club met the requirements of the ordinance for the issuance of a beer permit, and one of the Town's three beer permits was available, the trial court did not err in its ruling.

B. Conforming Pleadings to the Evidence

At the hearing, the Town attempted to argue that an additional reason for denying the Club the permit was its history of receiving citations from the Alcoholic Beverage Commission. The Club objected to the introduction of this evidence because this ground had not been alleged in the Town's answer. The Town proffered evidence of the prior citations to the trial court. The trial court denied the Town's Tenn. R. Civ. P. 15.02 motion to conform the pleadings to the evidence presented on the

ground that “you have to give some notice to that applicant of what you’re going to rely upon.” The trial court further ruled that evidence of prior citations issued to the Club by the state Alcoholic Beverage Commission was irrelevant, stating, “I don’t think these citations are relevant. I think convictions are relevant.”

Trial courts have broad discretion over amendments to the pleadings. *Biscan v. Brown*, 160 S.W.3d 462, 471 (Tenn. 2005); *Brooks v. Davis*, No. 01A01-9509-CV-00402, 1996 WL 99794, at *4 (Tenn. Ct. App. M.S., Mar. 8, 1996). “[T]he trial Court’s discretion in allowing amendments at any stage of the proceedings should not be disturbed on appeal unless it plainly appears that such discretion was abused.” *Lapray v. Smith*, 804 S.W.2d 87, 91 (Tenn. Ct. App. 1990) (quoting *Derryberry v. Ledford*, 506 S.W.2d 152, 156 (Tenn. Ct. App. 1973). Further, “the admission or exclusion of evidence is within the sound discretion of the trial court.” *Estate of Brock v. Rist*, 63 S.W.2d 729, 731 (Tenn. Ct. App. 2001). According to the Tennessee Supreme Court, “A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (internal quotations omitted). We find no abuse of discretion in the trial court’s decision to deny the Town’s motion to amend its pleadings under these circumstances.

We likewise do not find error in the trial court’s ruling that the evidence of the Club’s prior citations was irrelevant, in light of what the Town’s beer ordinance provides, or, as importantly, what it does not provide. The Town’s ordinance does not disqualify an applicant who has a history of citations issued by the Alcoholic Beverage Commission, nor could any provision in the ordinance be reasonably construed as so providing.

V. Conclusion

We conclude that the Town failed to establish a legally valid reason for refusing to issue the Club a permit under its beer ordinance and that the trial court did not err in ordering the Town to issue a beer permit to the club. Accordingly, the judgment of the trial court is affirmed. Costs on appeal are assessed to the Appellant, Town of Cumberland Gap.

SHARON G. LEE, JUDGE